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Nos. 95-1858, 96-110

In the Supreme Court of the United States

OCTOBER TERM, 1996

DENNIS C. VACCO, Attorney General of the State of New York, GEORGE E. PATAKI, Governor of the State of New York, and ROBERT M. MORGENTHAU, District Attorney of New York County,

Petitioners,

v.

TIMOTHY E. QUILL, M.D., SAMUEL C. KLAGSBRUN, M.D., and HOWARD A. GROSSMAN, M.D.,

Respondents.

STATE OF WASHINGTON, and CHRISTINE GREGOIRE, Attorney General of the State of Washington,

Petitioners,

v.

HAROLD GLUCKSBERG, M.D., ABIGAIL HALPERIN, M.D., THOMAS A. PRESTON, M.D., and PETER SHALIT, M.D., Ph.D.,

Respondents.

On Writs of Certiorari to the United States Courts of Appeals for the Second and Ninth Circuits

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BRIEF AMICUS CURIAE OF THE CATHOLIC MEDICAL ASSOCIATION IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether the New York and Washington statutes prohibiting physician assistance in suicide violate either the Due Process Clause or the Equal Protection Clause of the Fourteenth Amendment.

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BRIEF AMICUS CURIAE OF THE CATHOLIC MEDICAL ASSOCIATION IN SUPPORT OF PETITIONERS

INTEREST OF THE AMICUS CURIAE

The Catholic Medical Association ("CMA") is a non-profit, public service organization founded in 1932. The CMA promotes the principles of Roman Catholic medical ethics in science and in the practice of medicine. The

CMA includes more than one thousand physicians and coordinates the activities of more than 80 regional Catholic physicians' guilds in the United States and Canada.[1]

Since 1932, the CMA has published *The Linacre Quarterly*, a leading scholarly journal on biomedical ethics. The CMA's companion Linacre Institute routinely produces studies on important medical and moral issues. The CMA also serves as a resource for the medical community, holding annual conferences where scholars and health care professionals meet and interact.

The CMA, as an *amicus curiae* before this Court, seeks to contribute its professional and ethical perspective on physicians and their role in treating the terminally ill. Since its inception, the CMA has brought the practical experience and scholarly expertise of its members to bear on important societal issues. The CMA wishes to share with this Court the insights of the scholars and physicians that are its practicing members.

In addition to its own experience, the CMA hopes to inform the Court of a central theme in Catholic medical ethics, the distinction between meeting death with peace and dying at one's own hand.

For decades, Catholic religious and medical leaders have differentiated between suicide and the forgoing of life support. In rejecting such a distinction, the Second and Ninth Circuits broke from a venerable historical tradition. As a unique part of that tradition, the CMA asks the Court to consider its arguments in support of the Petitioners.

SUMMARY OF ARGUMENT

A right to give or receive assistance in suicide is neither implicit in the concept of ordered liberty nor deeply rooted in this Nation's history and tradition. Other than the Ninth Circuit in its decision below, every court that

[1] The parties in both *Vacco* and *Glucksburg* have consented to the filing of this brief. The parties' letters of consent have been submitted to the Clerk of the Court.

has considered physician assisted suicide has concluded that there is no such right. Indeed, even the Second Circuit, which invalidated New York's prohibition of assistance in suicide on equal protection grounds, concluded that such a right "finds no cognizable basis in the Constitution's language or design."

Respondents claim that assisted suicide involves a decision concerning one's own body and that, as such, it falls within the realm of personal liberty that government may not enter. But the concept of ordered liberty under the Due Process Clause does not equate with unrestrained autonomy, and this Court has never endorsed demands to assist those who would make seemingly personal choices that diminish their own lives or the common good.

A right to assisted suicide finds no support in this Nation's history and tradition. At common law, a person who assisted another to commit suicide was guilty of murder. At the time of the Fourteenth Amendment, the vast majority of states explicitly prohibited assisted suicide. Even today, forty-five states continue to criminalize the practice. *See* Appendix C.

Weighing against any interest in assisted suicide is the State's compelling interest in protecting, indeed its obligation to protect, the lives of its citizens. Given the origins of government, and the nature of the bargain between the State and its citizens, the State has an obligation to protect life simply because of its existence. This obligation does not vary with the circumstances of particular citizens, but applies to all persons under the State's authority and protection. In rejecting society's obligation to protect the lives of all its citizens, the Ninth Circuit erred.

The Second Circuit similarly erred in concluding that New York's prohibition against assistance in suicide violates the Equal Protection Clause. Although the Constitution requires that all persons similarly situated should be treated alike, the Constitution does not require things

that are different to be treated as though they were the same. Physician assisted suicide is fundamentally different from forgoing medical treatment because, unlike forgoing medical treatment, assisted suicide always involves an intent to kill. In confusing the distinction between knowledge and intent, the courts of appeals rejected the common-sense notion that one may choose to forgo disproportionately burdensome medical treatment and at the same time retain a strong desire to live. Unlike some who choose to forgo medical treatment, however, those who engage in assisted suicide have death as their purpose. Such a distinction based on intent more than satisfies the constitutional requirement of rationality and non-arbitrariness.

ARGUMENT

The Declaration of Independence states that it is "self-evident" that all men "are endowed by their Creator with certain unalienable Rights," and that among these rights are "Life, Liberty, and the Pursuit of Happiness." It is no accident that life is listed first. The Due Process Clause in the Fifth and Fourteenth Amendments also puts life first: No person shall be deprived of "life, liberty, or property, without due process of law . . . ." The reason for this ordering is apparent. Without life, there can be no other rights. As Justice Holmes said, "[l]ife is an end in itself, and the only question as to whether it is worth living is whether you have enough of it." [2]

Societies throughout history, including our own, have recognized life and its protection as an unqualified good, indeed, as *the* good from which other societal goods derive.[3] Physicians serve society by maintaining life, by

[2] Oliver Wendell Holmes, Jr., Speech to the Bar Association of Boston (Mar. 7, 1900) *in* Collected Legal Papers 244, 248 (1920).

[3] Society's unqualified commitment to life runs throughout traditional jurisprudence. In *Blackburn v. State*, 23 Ohio St. 146, 163 (1872), for example, the Ohio Supreme Court observed that:

> [T]he life of those to whom life has become a burden—of those who are hopelessly diseased or fatally wounded—nay, even the lives of criminals condemned to death, are under the protection of the law, equally as the lives of those who are in the full tide of life's enjoyment, and anxious to continue to live.

Accord, 4 William Blackstone, *Commentaries on the Laws of England* *189 ("The suicide is guilty of [an offense] against the King, who hath an interest in the preservation of all his subjects"). Similarly, this Court has acknowledged the constitutionality of such a fundamental choice for life:

> [W]e think a State may properly decline to make judgments about the "quality" of life that a particular individual may enjoy, and simply assert an unqualified interest in the preservation of human life . . . .

Cruzan v. Director, Missouri Dep't of Health, 497 U.S. 261, 282 (1990). *See also* Pope John Paul II, Encyclical Letter *Evangelium Vitae* ¶ 66 (March 25, 1995) (noting that life is God's gift and that suicide is a rejection of that gift); *accord*, 1 William Blackstone, *Commentaries on the Laws of England* *125 ("Life is the immediate gift of God, a right inherent by nature in every individual").

healing patients who request their help, and by promoting health, which is fundamental to the enjoyment of so many of life's virtues. Conversely, American society has always condemned physicians who stray from the healing path, who use their knowledge to harm, or who fail to fulfill their role as guardians of society's interest in life.[4]

The decisions here under review depart from the traditional, and salutary, emphasis on the protection of life. In invalidating New York and Washington State's prohibitions against assisted suicide, the Second and Ninth Circuits erred because: (1) a right to assisted suicide is neither implicit in the concept of ordered liberty nor deeply rooted in this Nation's history and tradition; (2) permitting assisted suicide cannot be reconciled with gov-

[4] *See, e.g., United States v. Brandt (the Medical Case)*, II Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10, at 181 (1949); *see also United States v. Stanley*, 483 U.S. 669, 708 (1987) (O'Connor, J., concurring in part and dissenting in part).

ernment's obligation to protect the lives of the governed; and (3) assisted suicide differs fundamentally from forgoing medical treatment, because assisted suicide, by definition, involves an intent to kill.

I. STATES MAY PROHIBIT ASSISTED SUICIDE CONSISTENT WITH THE DUE PROCESS CLAUSE BECAUSE SUCH PROHIBITIONS FURTHER SOCIETY'S UNQUALIFIED INTEREST IN LIFE.

This Court understandably has been "reluctant to expand the concept of substantive due process because guideposts for responsible decisionmaking in this unchartered area are scarce and open-ended." *Collins v. City of Harker Heights,* 503 U.S. 115, 125 (1992). As the Court itself has explained, "[t]he Court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution. . . . There should be, therefore, great resistance to expand the substantive reach of [the Due Process] Clauses, particularly if it requires redefining the category of rights deemed to be fundamental. Otherwise, the Judiciary necessarily takes to itself further authority to govern the country without express constitutional authority." *Bowers v. Hardwick,* 478 U.S. 186, 194-95 (1986).

Such concerns are no less apt in the area of physician assisted suicide, where "[b]road policy questions bearing on life and death issues are more properly addressed by representative assemblies." *See Cruzan v. Harmon,* 760 S.W.2d 408, 426 (Mo. 1988) (en banc), *aff'd sub nom. Cruzan v. Director, Missouri Dep't of Health,* 497 U.S. 261 (1990). As Judge Kleinfeld wrote in dissent in this case, "[t]he Founding Fathers did not establish the United States as a democratic republic so that elected officials would decide trivia, while all the great questions would be decided by the judiciary." Glucksberg App. at 161-62.

Because of the potentially boundless nature of substantive due process claims, this Court, in reviewing such

claims, has stressed the importance of carefully describing the asserted right and the legal issue that the Court is being asked to decide. *See, e.g., Planned Parenthood v. Casey,* 505 U.S. 833, 847-48 (1992); *Michael H. v. Gerald D.,* 491 U.S. 110, 118-30 (1989). In the Court's words, " '[s]ubstantive due process' analysis must begin with a careful description of the asserted right, for '[t]he doctrine of judicial self-restraint requires us to exercise the utmost care whenever we are asked to break new ground in this field.' " *Reno v. Flores,* 507 U.S. 292, 302 (1993) (citations omitted). Interests for which constitutional protection is sought "cannot be described merely at the level of philosophic abstraction . . . ." Mark E. Chopko & Michael F. Moses, *Assisted Suicide: Still A Wonderful Life?,* 70 Notre Dame L. Rev. 519, 559 (1995). It is critical to determine precisely what right is being asserted when statutes like those at issue here are said to violate the Due Process Clause. It is also important to inquire whether any other due process interests would be implicated if this Court were to recognize the claimed physician's right to assist in suicide.

A. A Right to Give or Receive Assistance in Suicide Is Neither Implicit in the Concept of Ordered Liberty, Nor Deeply Rooted in This Nation's History and Tradition.

Respondents assert a right, under certain circumstances, intentionally to terminate the life of a human being—a human being that the law regards as innocent of any offense. This case does not involve society's imposition of death as a sanction for some heinous wrong. Rather, it involves an alleged constitutional right to intervene to introduce a new causative factor, one which, in the absence of the intervention, would play no role in bringing about the patient's death. The Ninth Circuit failed to appreciate the significance, for constitutional purposes, of such intentional causation of death through the deliberate introduction of a poisonous drug or other lethal substance. The

court focused incorrectly on the end—death—rather than on the means by which that death occurs. In the court's words, "it is the end and not the means that defines the liberty interest."[5] By concentrating on the abstract "right to die," the court obscured meaningful practical and constitutional distinctions:

> [W]e see no ethical or constitutionally cognizable difference between a doctor's pulling the plug on a respirator and his prescribing drugs which will permit a terminally ill patient to end his own life. . . . *To us, what matters is that the death is the intended result as surely in one case as in the other.*

Glucksberg App. at 82 (emphasis supplied).

This Court, however, historically has afforded protection only to those interests "implicit in the concept of ordered liberty," such that "neither liberty nor justice would exist if they were sacrificed." *Palko v. Connecticut*, 302 U.S. 319, 325-26 (1937), *quoted in Bowers v. Hardwick*, 478 U.S. 186, 191-92 (1986). In an alternative formulation, this Court has described those interests entitled to constitutional protection as ones "deeply rooted in this Nation's history and tradition." *Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977).

Other than the Ninth Circuit in the decision below, every court that has considered physician assisted suicide has concluded that "the right to commit suicide is neither implicit in the concept of ordered liberty nor deeply rooted in this nation's history and tradition. It would be an impermissibly radical departure from existing tradition, and

[5] Glucksberg App. at 27. In response to similar arguments nearly seventy years ago, Justice Brandeis issued his famous warning:

> To declare that in the administration of the criminal law the end justifies the means . . . would bring terrible retribution. Against that pernicious doctrine this Court should resolutely set its face.

Olmstead v. United States, 277 U.S. 438, 468 (1928) (Brandeis, J., dissenting), *overruled by Katz v. United States*, 389 U.S. 347 (1967).

from the principles that underlie that tradition, to declare that there is such a fundamental right protected by the Due Process Clause." *See, e.g., People v. Kevorkian*, 447 Mich. 436, 481, 527 N.W.2d 714, 732 (1994), *cert. denied*, 115 S. Ct. 1795 (1995). Even the Second Circuit, which invalidated on equal protection grounds New York's prohibition against assistance in suicide, concluded that "[t]he right to assisted suicide finds no cognizable basis in the Constitution's language or design, even in the very limited cases of those competent persons who, in the final stages of terminal illness, seek the right to hasten death." Vacco App. at 19a.[6]

The concept of ordered liberty under the Due Process Clause does not equate with unrestrained autonomy. For example, this Court has never held that the Constitution confers an absolute right to do as one pleases with one's own body. *See, e.g., Roe v. Wade*, 410 U.S. 113, 154 (1973) (refusing to recognize such a right). Thus, a person has a right to refuse medical treatment, but no right to refuse vaccination from contagious disease. *See Washington v. Harper*, 494 U.S. 210, 222 (1990); *Jacobson v. Massachusetts*, 197 U.S. 11, 26-27 (1905) (rejecting autonomy right in favor of the common good). A person has a right to marry, but no right to marry his or her blood relatives. A person has a right to direct the upbringing of his or her children, but no right to expose them to deadly harm. *See Prince v. Massachusetts*, 321 U.S. 158, 166 (1944). "The statute books are replete with constitutionally unchallenged laws against prostitution, suicide, voluntary self-mutilation, brutalizing 'bare fist' prize fights, and duels, although these crimes may only directly involve 'consenting adults.'" *Paris Adult*

[6] Courts from other common law jurisdictions have reached similar conclusions. The Supreme Court of Canada, for example, has rejected a claim that Section 7 of the Canadian Charter of Rights and Freedoms, similar in scope to the Due Process Clause, establishes a fundamental right to physician assisted suicide. *See generally Rodriguez v. British Columbia (Attorney General)*, 3 S.C.R. 519 (Can. 1993).

Theatre I v. Slaton, 413 U.S. 49, 68 n.15 (1973). In each of these instances, claims for individual autonomy must be balanced against, and sometimes subordinated to, the common good. Indeed, the law has always acted to restrain choice that harms individual persons. Because we are a society that "strongly affirms the sanctity of life," [7] this Court has never endorsed demands to assist those who would make seemingly personal choices that diminish their own lives or the common good.

Respondents, however, maintain that "there is a realm of personal liberty which the government may not enter." Glucksberg et al., Opposition to Petition for Writ of Certiorari at 12. They further argue that this Court's precedent in the area of reproductive choice "acknowledge[s] that *decisions concerning one's own body*, one's own medical care, and one's own future life course fall within that realm." *Id.* (emphasis supplied). Yet, this Court has routinely rejected such an expansive view of personal autonomy, holding that there is no "*unlimited right to do with one's body as one pleases.*" *Roe*, 410 U.S. at 154 (emphasis supplied); *see also Bowers*, 478 U.S. at 191; *Slaton*, 413 U.S. at 68.

A due process right to physician assisted suicide also remains unsupported by this nation's history and tradition. "At common law suicide was a felony, punished by forfeiture of property to the king and ignominious burial. . . . Essentially, suicide was considered a form of murder." *In re Joseph G.*, 34 Cal. 3d 429, 433, 194 Cal. Rptr. 163, 165 (1983) (citations omitted). In the United States, most jurisdictions today regard suicide as "an expression of mental illness" or depression.[8] *Id.* Further, at common law, a person who assisted another to commit suicide was guilty of murder. *In re Joseph G.*, 34 Cal. 3d at 434, 194 Cal. Rptr. at 165. Perhaps most telling is the fact that "[a]t the time the Fourteenth Amendment was ratified, at least twenty-one of the thirty-seven existing states (including eighteen of the thirty ratifying states) proscribed assisted suicide either by statute or as a common-law offense." *Kevorkian*, 447 Mich. at 478, 527 N.W.2d at 731. Indeed, in *Cruzan*, Justice Scalia concluded that " 'there is no significant support for the claim that a right to suicide is so rooted in our tradition that it may be deemed 'fundamental' or 'implicit in the concept of ordered liberty.' ' " *Cruzan*, 497 U.S. at 295 (Scalia, J., concurring) (citations omitted). Of course, if there is no liberty interest to commit suicide, there can be no liberty interest in receiving the assistance of another to do so. *Kevorkian*, 447 Mich. at 468 n.35, 527 N.W.2d at 726 n.35.

Respondents and the Ninth Circuit attempt to avoid this historical consensus in two ways. First, they question the continued vitality of this Court's reasoning in *Palko v. Connecticut* and *Moore v. East Cleveland*. *See, e.g.*, Glucksberg App. at 55 (suggesting that *Palko's* actual language results in too strict a test); Glucksberg et al., Brief of Appellees in the Ninth Circuit at 27 n.29 (arguing that, instead of *Palko's* ordered liberty test, the Ninth Circuit should look to the "conscience of the people").

Instead of looking to *Palko* and *Moore*, respondents extract certain language from this Court's decision in *Casey* to formulate a new general test for evaluating rights under the Due Process Clause. In *Casey*, the Court stated that "[t]hese matters, involving the most intimate

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[7] *Furman v. Georgia*, 408 U.S. 238, 286 (1972) (Brennan, J., concurring).

[8] The medical literature amply supports such conclusions. "Studies that examine the psychological background of individuals who kill themselves show that 95 percent have a diagnosable mental disorder at the time of death." New York State Task Force on Life and the Law, *When Death is Sought: Assisted Suicide and Euthanasia in the Medical Context* 11 (May 1994). Further, "[l]ike other suicidal individuals, patients who desire suicide or an early death during a terminal illness are usually suffering from a treatable mental illness, most commonly depression." *Id.* at 13.

and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life." *Casey*, 505 U.S. at 851. On the basis of this language, respondents identify any issue potentially important to personal dignity as a liberty interest, and then inquire whether, under a balancing test, that interest has been burdened by state action. *See, e.g.*, Glucksberg App. at 54-62.

Respondents' approach reads far too much into a single excerpt from the opinion in *Casey* and ignores the context in which that statement was made. *Casey* did not purport to engage in a fresh due process inquiry; indeed, as the plurality opinion demonstrates, a woman's right to choose an abortion was explicitly retained based on the settled expectations of *stare decisis*. *Casey*, 505 U.S. at 871. *Casey*, therefore, is an inappropriate tool to use as a lever to expand the limits of this Court's previously settled due process jurisprudence. Moreover, this Court's abortion cases in general, and the *Casey* opinion in particular, should not be used to draw general conclusions about the Due Process Clause outside the abortion context. Instead, as the Court has observed, "[a]bortion is a *unique* act. [In abortion,] . . . the liberty of the woman is at stake in a sense unique to the human condition and so *unique* to the law." *Id.* at 852 (emphasis supplied).

The Ninth Circuit's opinion below also attempts to avoid the historical consensus on assisted suicide by augmenting history. Although acknowledging society's historic opposition to assisted suicide, the Ninth Circuit refers to a supposedly "strong undercurrent of a time-honored but hidden practice" of assisted suicide that runs "beneath the official history of legal condemnation of physician-assisted suicide." Glucksberg App. at 51. This approach, however, fundamentally misapplies the reasoning of *Moore v. East Cleveland*, by giving preference to

an esoteric historical account over innumerable public acts rejecting the practice of assisted suicide.[9]

B. The State Has a Compelling Interest in Protecting, and Indeed an Obligation to Protect, the Lives of Its Citizens.

Even if this Court were to recognize some protected interest in giving or receiving assistance in suicide, that would not end the matter. The Court would need also to consider a State's compelling interest in protecting—indeed, the State's obligation to protect—the lives of its citizens.

As John Locke wrote, the "great and chief end" of those who "seek out and [are] willing to join in society" is "the *mutual* preservation of their lives." John Locke, *Two Treatises on Government* 350 (Peter Laslett ed. 1988) (emphasis supplied).[10] For Locke, and for the Framers of our Constitution, human beings come together in free society, consent to be governed, and, in return, receive a covenant from government that each citizen's life will be protected equally and unqualifiedly before the law. *Id.* As this Court has held, that covenant applies broadly to:

> all the powers of government, legislative as well as executive and judicial. It necessarily happened, therefore, that as these broad and general maxims of liberty and justice held in our system a different place and performed a different function from their position and office in English constitutional history and law, they would receive and justify a corresponding and more comprehensive interpretation. Applied in England only as guards against executive usurpation and

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[9] Perhaps mindful of the implausibility of its own historical account, the Ninth Circuit also refers to what it terms "drastic changes" in the public's recent attitudes toward physician assisted suicide. Glucksberg App. at 77.

[10] Locke was a staunch opponent of suicide, regarding it as the duty of each citizen "not to quit [one's] station willfully." John Locke, *Two Treatises on Government* 271 (Peter Laslett ed. 1988).

> tyranny, here they . . . must be held to guaranty not particular forms of procedure, but the very substance of individual rights to life, liberty, and property.

Hurtado v. California, 110 U.S. 516, 531 (1884).

Given the origins of government, and the nature of the bargain between the State and its citizens, the State has an obligation to protect life simply because of its existence, apart from any other consideration. This obligation does not vary with the circumstances of particular citizens but applies to all persons under the State's authority. As the Ohio Supreme Court wrote not long after the adoption of the Fourteenth Amendment:

> The life of those to whom life has become a burden —of those who are hopelessly diseased or fatally wounded—nay, even the lives of criminals condemned to death, are under the protection of the law, equally as the lives of those who are in the full tide of life's enjoyment, and anxious to continue to live.

Blackburn v. State, 23 Ohio St. 146, 163 (1872); *accord*, *Cruzan*, 497 U.S. at 295 (Scalia, J., concurring).[11]

Both history and tradition support the State's obligation to protect life and the citizen's right to expect such protection. Ever since the founding of the Republic, we have been a nation that "strongly affirms the sanctity of life." *Furman v. Georgia*, 408 U.S. 238, 286 (1972) (Brennan,

[11] This principle runs throughout Catholic medical ethics as well. Indeed, the Catholic Church has always taught that "[t]he inviolability of human life means and implies in the last analysis the illicitness of every act which directly suppresses human life. 'The inviolability of the right to life of the innocent human being from conception to death is a sign and a requirement of the very inviolability of the person, to whom the Creator has given the gift of life.'" Pontifical Council for Pastoral Assistance to Health Care Workers, *Charter for Health Care Workers* ¶ 136 (Boston: Daughters of St. Paul 1995), *quoting* Sacred Congregation for the Doctrine of the Faith, Instruction *Donum Vitae*, *in* 80 Actus Apostolicae Sedes 75-76 (1988).

J., concurring). "As a general matter, the States—indeed, all civilized nations—demonstrate their commitment to life by treating homicide as a serious crime. Moreover, the majority of States in this country have laws imposing criminal penalties on one who assists another to commit suicide." *Cruzan*, 497 U.S. at 280. As the British House of Lords recently concluded, this fundamental proposition is shared by all common law countries and is expressed in:

> society's prohibition of intentional killing. *That prohibition is the cornerstone of law and of social relationships. It protects each one of us impartially, embodying the belief that all [lives] are equal.*

Select Committee on Medical Ethics of the House of Lords, *Report of the Select Committee on Medical Ethics* 48 (Jan. 1994) (emphasis supplied).[12]

Physician assisted suicide always involves the taking of human life, and, as such, permitting it would run counter to the State's fundamental obligation to protect its citizens. To be sure, physician assisted suicide advocates, including respondents, seek to limit the practice to certain narrowly defined circumstances, such as where a person is both terminally ill and mentally competent.[13] *See, e.g.*, Glucksberg App. at 9-11. All such proposed limitations, how-

[12] The House of Lords went on to apply this "cornerstone of law" to physician assisted suicide and euthanasia. It concluded that, "[w]e do not wish that protection to be diminished and we therefore recommend that there should be no change in the law to permit euthanasia." Select Committee on Medical Ethics of the House of Lords, *Report of the Select Committee on Medical Ethics* 48 (Jan. 1994).

[13] If this Court were to find a right to physician assisted suicide, it is by no means certain that such a right could be limited to the terminally ill. At least one lower court has held that any such limitation would violate the Equal Protection Clause. *See generally Lee v. Oregon*, 891 F. Supp. 1429 (D. Or. 1995), *appeal docketed*, Nos. 95-35804, 95-35805, 95-35854, 95-35948, 95-35949 (9th Cir. Aug. 7, 1995).

ever, necessarily rest on a judgment about quality of life. Such judgments are foreign to this Court's jurisprudence.

In *Cruzan*, this Court held that "a State may properly decline to make judgments about the 'quality' of life that a particular individual may enjoy, and simply assert an unqualified interest in the preservation of human life . . . ." *Cruzan*, 497 U.S. at 282. Indeed, the risk in making such decisions about quality of life is great. As the Missouri Supreme Court noted in *Cruzan*, "[w]ere quality of life at issue, persons with all manner of handicaps might find the state seeking to terminate their lives." *Cruzan v. Harmon*, 760 S.W.2d 408, 420 (Mo. 1988) (en banc), *aff'd sub nom. Cruzan v. Director, Missouri Dep't of Health*, 497 U.S. 261 (1990). Not surprisingly, the disabled count themselves among the strongest opponents of physician assisted suicide, which they regard as "based on erroneous judgments concerning the quality of life of a person with a disability or on social judgments that such a person's continued existence will impose an 'unacceptable' burden on his or her family or on the Nation as a whole. These judgments are often grounded in misinformation, inaccurate stereotypes, and negative attitudes about people with disabilities." United States Commission on Civil Rights, *Medical Discrimination Against Children with Disabilities* 12 (1989).

This Court itself has previously declined to differentiate among the due process rights of individuals based on their quality of life. In *United States v. Rutherford*,[14] terminal cancer patients sued to overturn the FDA's decision that Laetrile was not "safe and effective" within the meaning of the Food, Drug, and Cosmetic Act.[15] They sought, in effect, to substitute their judgment for that of the medical community about what might improve their quality of life.

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[14] 442 U.S. 544 (1979).

[15] 21 U.S.C. §§ 201, 355 (1996).

The terminally ill plaintiffs in *Rutherford* convinced a lower court that they had a due process right to choose even potentially unsafe and ineffective drugs because of their diminished quality of life.[16] Plaintiffs argued that the definition of safe and effective medical care had to be modified because their lives, which were of presumably limited duration, were entitled to a lesser degree of governmental protection.[17] This Court refused to recognize any dilution of due process based on quality of life. *Rutherford*, 442 U.S. at 555, 559. Although *Rutherford* ultimately was resolved on statutory grounds, it illustrates the caution with which courts should approach arguments based on diminished quality of life. *Id.*

Even if the Court were inclined to recognize some protected interest in suicide or assisted suicide, therefore, it should also recognize a fundamental obligation on the part of the State to protect the lives of its citizens. Allowing physician assisted suicide is incompatible with that obligation. As one medical organization recently observed, physician assisted suicide involves:

> *the deliberate taking of human life [and] should remain a crime.* This [Association's] rejection of a change in the law to permit doctors to intervene to end a person's life is not just a subordination of individual well-being to social policy. *It is instead an affirmation of the supreme value of the individual, no matter how worthless and hopeless that individual may feel.*

British Medical Association, *Euthanasia: Report of the Working Party to Review the British Medical Association's Guidance on Euthanasia* 69 (1988).[18]

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[16] *Rutherford v. United States*, 438 F. Supp. 1287, 1298-1301 (W.D. Okla. 1977).

[17] *Rutherford*, 442 U.S. at 551.

[18] Confirming the existence of a fundamental governmental obligation to protect the lives of its citizens would *not* require this Court

II. STATES MAY PROHIBIT ASSISTED SUICIDE CONSISTENT WITH THE EQUAL PROTECTION CLAUSE BECAUSE, UNLIKE FORGOING MEDICAL TREATMENT, ASSISTED SUICIDE ALWAYS INVOLVES AN INTENT TO KILL.

Although the Equal Protection Clause requires that "all persons similarly circumstanced should be treated alike, . . . [t]he Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same." *Plyler v. Doe*, 457 U.S. 202, 216 (1982) (internal quotations and citations omitted). Instead, disparate treatment normally will pass equal protection scrutiny if the statutory classification is "rationally related to a legitimate state interest." *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985).

The Second Circuit invalidated New York's prohibition against physician assisted suicide, reasoning that a state may not allow a terminally ill patient to hasten his or her death by forgoing life support and, at the same time, prevent a physician from dispensing lethal drugs to a terminally ill patient who wishes to use them to commit suicide. Vacco App. at 29a-30a. The Second Circuit based its holding on the premise that forgoing medical treatment and assisted suicide are indistinguishable. Vacco App. at 30a-31a. The Second Circuit failed to recognize, however, that physician assisted suicide always involves an intent to terminate a life, while forgoing medical treatment does not. The court also disregarded legitimate state interests supporting New York's prohibition of physician assisted suicide.

to reexamine any of its prior decisions. A person can forfeit either liberty or life through wrongdoing or malfeasance. That fact does not diminish the importance of those rights any more than the fact that there are inmates in our prisons calls into question the inalienability of the rights Jefferson declared.

Nor is there any inconsistency with this Court's decisions in *Casey* and earlier cases dealing with abortion. This Court has held that abortion does not extinguish the life of a "person" for purposes of the Fourteenth Amendment. *Roe*, 410 U.S. at 153 ("The word 'person,' as used in the Fourteenth Amendment, does not include the unborn"). Even so, it is well-settled that the States at least have "legitimate interests from the outset of the pregnancy in protecting . . . the life of the fetus that may become a child." *Casey*, 505 U.S. at 846.

The moral, civil, and common law has always regarded the refusal or withdrawal of medical treatment as fundamentally different from suicide.[19] There is, moreover, an obvious common-sense basis for this distinction. According to the American Bar Association, decisions to refuse treatment are "legally and ethically distinct" from decisions to administer "a lethal agent with the intentional purpose of terminating life." American Bar Association, Commission on Legal Problems of the Elderly, Memorandum of Jan. 17, 1992, *reprinted in* 8 Issues L. & Med. 117, 118 (1992). Assisted suicide "involves not letting the patient die, but making the patient die . . . ." Stephen L. Carter, *The Culture of Disbelief: How American Law and Politics Trivialize Religious Devotion* 236 (1993).

The difference between forgoing medical treatment and assisted suicide centers on the *mens rea* necessarily involved. According to one commentator:

> The definition of *suicide requires that one's actions be carried out for the purpose of bringing about death either as an end or as a means.* The soldier who throws himself on the live grenade to save his companions, for example, is not aiming at death. That is, he does not intentionally jump on the grenade for the purpose of bringing about his death, but rather for the purpose of saving his companions. This is clear if one considers that, if he lives and his companions are saved, then he would have achieved his purpose without dying. For this reason, his act is

[19] *See* Yale Kamisar, *Against Assisted Suicide—Even a Very Limited Form*, 72 U. Det. Mercy L. Rev. 735, 753-60 (1995); Thomas J. Marzen et al., *Suicide: A Constitutional Right?* 24 Duq. L. Rev. 1, 9-13 (1985).

> not counted as suicide. On the other hand, consider the man who kills himself so his family can enjoy the proceeds from his life insurance. Clearly, he intentionally carries out his actions for the purpose of bringing about death. He is aiming at his death, albeit as a means to another end: if he lives, he would have failed in his purpose since, without his death, no inheritance will be forthcoming.

Manual G. Velasquez, *Defining Suicide,* 3 Issues L. & Med. 37, 49 (1987) (emphasis supplied). Assisted suicide, therefore, necessarily involves an intent to kill. Patients, on the other hand, can forgo medical treatment without such an intent. Indeed, they may act:

> in order to safeguard themselves at the point of death against "the use of techniques that run the risk of becoming abusive." Contemporary Medicine in fact, has at its disposal methods which artificially delay death, without any real benefit to the patient. It is merely keeping one alive or prolonging life for a time, at the cost of further, severe suffering. This is so-called "therapeutic obstinacy," which consists "of the use of methods which are particularly exhausting and painful for patients, condemning them, in fact, to an artificially prolonged agony."

Pontifical Council for Pastoral Assistance to Health Care Workers, *Charter for Health Care Workers* ¶ 119 (Boston: Daughters of St. Paul 1995), *quoting* Pope John Paul II, *Address to the Participants at the International Congress on Assistance to the Dying, in* OssRom, Mar. 18, 1992. at 65 n.4; and Sacred Congregation for the Doctrine of the Faith, *Declaration on Euthanasia* 549 (Boston: Daughters of St. Paul 1980). In such circumstances:

> For doctors and their assistants it is not a question of deciding the life or death of an individual. It is simply a question of being a doctor, that is of posing the question and then deciding according to one's expertise and one's conscience regarding a respectful care of the living and the dying of the patient en-

> trusted to one. This responsibility does not always and in all cases involve recourse to every means [of treatment]. It might also require the renunciation of certain means to make way for a serene and Christian acceptance of death, which is inherent in life. It might also mean respect for the wishes of the patient who refuses the use of such means.

Pontifical Council for Pastoral Assistance to Health Care Workers, *Charter for Health Care Workers* ¶ 121 (Boston: Daughters of St. Paul 1995). Properly understood, forgoing treatment occurs with neither the patient nor the physician desiring that death occur. Neither intends to cause or hasten it. Instead, the inquiry focuses on whether the medical treatment in question is effective, overly burdensome, and requires heroic virtue to endure. If so, the patient may choose to forgo the treatment as an end in itself. *Id.* The fact that death may result is merely a foreseen but unintended side effect. *Id.*

Medical science can offer numerous examples in which the decision to forgo medical treatment does not involve an intent to kill or to die. For example, a feeding tube can become hopelessly burdensome. The tube can cause significant pain, it can result in serious infection, and it can fail to transmit nourishment effectively. Under such circumstances, the patient might well choose to forgo the feeding tube as disproportionately burdensome. The patient could make such a choice, however, while at the same time hoping that he or she could be effectively fed intravenously and praying that the underlying pathology would abate. The fact that intravenous feeding may turn out ultimately to be ineffective and that the patient ultimately may die as a result does not change the analysis.

The Second and Ninth Circuits, in rejecting any distinction between assisted suicide and forgoing medical treatment, seem to confuse purpose or intent with knowledge. Vacco App. at 30a-31a; Glucksberg App. at 78-82. As the Ninth Circuit held:

> [W]e see little, if any, difference for constitutional . . . purposes between providing medication with a double effect and providing medication with a single effect, as long as one of the *known* effects in each case is to hasten the end of the patient's life. Similarly, we see no ethical or constitutionally cognizable difference between a doctor's pulling the plug on a respirator and his prescribing drugs which will permit a terminally ill patient to end his own life. In fact, some might argue that pulling the plug is a more culpable and aggressive act on the doctor's part and provides more reason for criminal prosecution. *To us, what matters most is that the death of the patient is the intended result as surely in one case as in the other.*

Glucksberg App. at 82 (emphasis supplied).

This Court previously has highlighted the distinction between purpose and knowledge. In *United States v. Bailey*,[20] for example, the Court recognized that "[f]ew areas of criminal law pose more difficulty than the proper definition of the *mens rea* required for any particular crime."[21] *Bailey* established a "hierarchy of culpable states of mind" and distinguished among "purpose, knowledge, recklessness, and negligence."[22] In doing so, it explained that "[p]erhaps the most significant and most esoteric, distinction drawn by this analysis is that between the mental states of 'purpose' and 'knowledge.'"[23] The distinction becomes particularly important:

> [i]n certain narrow classes of crimes [where] . . . heightened culpability has been thought to merit special attention. Thus, the statutory and common law of homicide often distinguishes, either in setting

[20] 444 U.S. 394 (1980).

[21] *Id.* at 408.

[22] *Id.* at 404.

[23] *Id.*

> the "degree" of the crime or in imposing punishment, between a person who knows that another person will be killed as the result of his conduct and a person who acts with the specific purpose of taking another's life.[24]

As a definitional matter, this Court held that:

> [A] person who causes a particular result is said to act purposely if "he consciously desires that result, whatever the likelihood of that result happening from his conduct," while he is said to act knowingly if he is aware "that the result is practically certain to follow from his conduct, whatever his desire may be as to that result."[25]

This Court's recognition of the distinction between purpose, on the one hand, and a foreseen but unintended side effect, on the other, is perhaps most clearly set out in *Personnel Adm'r of Mass. v. Feeney*.[26] There, the Court relied on the distinction (sometimes referred to as the "principle of double effect") in addressing a claim that Massachusetts had discriminated impermissibly on the basis of gender by giving hiring preferences to military veterans, most of whom were men. *Feeney*, 442 U.S. at 259. The Court observed:

> The appellee's ultimate argument rests upon the presumption, common to the criminal and civil law, that a person intends the natural and foreseeable consequences of his voluntary actions. . . . [Culpable] purpose, however, implies more than intent as volition or intent as awareness of consequences. It implies that the decisionmaker, in this case a state legislature, selected or reaffirmed a particular course of action at least in part "because of," not merely "in spite of," its adverse effects . . . .

Id. at 278-79.

[24] *Id.* at 405.

[25] *Id.* at 404 (citation omitted).

[26] 442 U.S. 256 (1979).

Respondents may argue that, apart from any distinction between assisted suicide and forgoing medical treatment, many people actually forgo medical treatment with the intent of hastening death. That, unfortunately, may be so, but it does not lessen in any way the validity of the distinction for those who forgo treatment without an intent to kill. Nor does it disable the State from relying on the distinction in determining which conduct should be proscribed.

The fact that statutes in all fifty states distinguish between forgoing certain medical treatment and physician assisted suicide confirms both the reasonableness and the widespread nature of the distinction. Appendix B lists the numerous state living will statutes that expressly permit forgoing life support but at the same time reject physician assisted suicide. Appendix A lists the many state court decisions that adopt the same distinction. Appendix C lists the state statutes and judicial decisions that criminalize assisting a suicide but say nothing about forgoing medical treatment. All of this authority supports the proposition that a person's intent is central in determining the proper legal characterization of acts or omissions. As Justice Scalia wrote in *Cruzan*:

> Starving oneself to death is no different from putting a gun to one's own temple as far as the common law definition of suicide is concerned [because both involve] "the suicide's *conscious decision* to [put] an end to his own existence."

Cruzan, 497 U.S. at 296-97 (Scalia, J., concurring) (emphasis supplied and citations omitted).

Respondents also may argue that physicians at times cause death by employing measures deliberately chosen for the treatment of pain. Indeed, both the Second and Ninth Circuit explicitly mention such allegations in their opinions below. Vacco App. at 30a-31a; Glucksberg App. at 79. Once again, the physician's purpose, the result the physician intends to produce, provides a principled basis

on which to distinguish between assisted suicide and palliative care. As one medical text observes:

> Human and Christian prudence suggests the use for most patients of medicines which alleviate or suppress pain, even if this causes torpor or reduced lucidity. . . . When "proportionate means" so require, "it is permitted to use with moderation narcotics which alleviate suffering, but which also hasten death." In this case, "death is not intended or sought in any way, although there is a risk of it for a reasonable cause: what is intended is simply the alleviation of pain in an effective way, using for that purpose those painkillers available to medicine."

Pontifical Council for Pastoral Assistance to Health Care Workers, *Charter for Health Care Workers* ¶¶ 122-23 (Boston: Daughters of St. Paul 1995), *quoting* Sacred Congregation for the Doctrine of the Faith, *Declaration on Euthanasia* 548 (Boston: Daughters of St. Paul 1980). Further, the opinions below vastly underrate both medical science's capacity to treat pain effectively and its ability to avoid any unintended lethal side effects of palliative care. *See, e.g.*, Michael H. Levy, *Drug Therapy: Pharmacologic Treatment of Cancer Pain*, 335 New Eng. J. Med. 1124, 1124-32 (1996) (noting that the appropriate use of pain medications, particularly in combination, "rarely results in respiratory depression or cardiovascular collapse").

In order for the New York and Washington State statutory schemes to survive equal protection scrutiny, they need only a rational basis. *Cleburne Living Ctr.*, 473 U.S. at 440. The fact that a statute may have other effects or be unwise as a matter of public policy will not suffice. *Id.* Only if such legislation is irrational will the Court invalidate it. *Kadrmas v. Dickinson Pub. Sch.*, 487 U.S. 450, 462 (1988) ("Social and economic legislation . . . carries with it a presumption of rationality that can only be overcome by a clear showing of arbitrariness and irrationality."). Indeed, in discussing such rational basis scrutiny, this Court has stated that:

> the Fourteenth Amendment permits the States a wide scope of discretion in enacting laws which affect some groups of citizens differently than others. The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective. State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it.

McGowan v. Maryland, 366 U.S. 420, 425-26 (1961). Given the intent-based distinction between assisted suicide and forgoing medical treatment, the New York and Washington State statutory schemes more than satisfy the constitutional requirement of rationality and non-arbitrariness.

CONCLUSION

The judgments of the courts of appeals should be reversed.

Respectfully submitted,

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APPENDICES

APPENDIX A

The state courts of last resort that have distinguished between forgoing life support and assisted suicide include:

Rasmussen v. Fleming, 154 Ariz. 207, 218, 741 P.2d 674, 685 (1987)

Thor v. Superior Court, 5 Cal. 4th 725, 742, 855 P.2d 375, 385, 21 Cal. Rptr. 2d 357, 367 (1993)

McConnell v. Beverly Enters., 209 Conn. 692, 710, 553 A.2d 596, 605 (1989)

In re Browning, 568 So. 2d 4, 14 (Fla. 1990)

State v. McAfee, 259 Ga. 579, 580, 385 S.E.2d 651, 652 (1989)

In re Estate of Longeway, 133 Ill. 2d 33, 41, 549 N.E.2d 292, 296 (1989)

In re Lawrance, 579 N.E.2d 32, 40 n.4 (Ind. 1991)

DeGrella ex rel. Parrent v. Elston, 858 S.W.2d 698, 707 (Ky. 1993)

In re P.V.W., 424 So. 2d 1015, 1022 (La. 1982)

In re Gardner, 534 A.2d 947, 955-56 (Me. 1987)

In re Doe, 411 Mass. 512, 522, 583 N.E.2d 1263, 1270, *cert. denied*, 503 U.S. 950 (1992)

Brophy v. New England Sinai Hosp., 398 Mass. 417, 439, 497 N.E.2d 626, 638 (1986).

Superintendent of Belchertown v. Saikewicz, 373 Mass. 728, 744 n.11, 370 N.E.2d 417, 426 n.11 (1961)

People v. Kevorkian, 447 Mich. 436, 472-73, 527 N.W.2d 714, 728-29 (1994), *cert. denied*, 115 S. Ct. 1795 (1995)

McKay v. Bergstedt, 106 Nev. 808, 823, 801 P.2d 617, 627 (1990)

In re Farrell, 108 N.J. 335, 350, 529 A.2d 404, 411 (1987)

In re Conroy, 98 N.J. 321, 350-51, 486 A.2d 1209, 1224 (1985)

In re Quinlan, 70 N.J. 10, 51-52 & n.9, 355 A.2d 647, 669-70 & n.9, *cert. denied*, 429 U.S. 922 (1976)
Fosmire v. Nicoleau, 75 N.Y.2d 218, 227 n.2, 551 N.E.2d 77, 82 n.2, 551 N.Y.S.2d 876, 881 n.2 (1990)
In re Storar, 52 N.Y.2d 363, 377, 420 N.E.2d 64, 71, 438 N.Y.S.2d 266, 273, *cert. denied*, 454 U.S. 358 (1981)
In re Fiori, 673 A.2d 905, 910 (Pa. 1996)
In re Grant, 109 Wash. 2d 545, 563-64, 747 P.2d 445, 454-55 (1987), *modified on other grounds*, 757 P.2d 534 (Wash. 1988)
In re L.W., 167 Wis. 2d 53, 83, 482 N.W.2d 60, 71 (1992)

A number of state lower courts have also distinguished between forgoing life support and assisted suicide, including:

Donaldson v. Lundgren, 2 Cal. App. 4th 1614, 1621, 4 Cal. Rptr. 2d 59, 62 (1992)
People v. Adams, 216 Cal. App. 3d 1431, 1440, 265 Cal. Rtpr. 568, 573-74 (1990)
Bouvia v. Superior Court, 179 Cal. App. 3d 1127, 1144-45, 225 Cal. Rptr. 297, 306 (1986)
Bartling v. Superior Court, 163 Cal. App. 3d 186, 196, 209 Cal. Rptr. 220, 225 (1984)
Barber v. Superior Court, 147 Cal. App. 3d 1006, 1012, 195 Cal. Rptr. 484, 487 (1983)
Foody v. Manchester Mem. Hosp., 40 Conn. Supp. 127, 137, 482 A.2d 713, 720 (Super. Ct. 1984)
In re Severns, 425 A.2d 156, 158 (Del. Ch. 1980)
Satz v. Perlmutter, 362 So. 2d 160, 162 (Fla. Dist. Ct. App. 1978), *aff'd*, 379 So. 2d 359 (Fla. 1980)
In re Rosebush, 195 Mich. App. 675, 681 n.2, 491 N.W.2d 633, 636 n.2 (1992)
Von Holden v. Chapman, 87 A.D.2d 66, 70, 450 N.Y.S.2d 623, 627 (App. Div. 1982)

In re Eichner, 102 Misc. 2d 184, 205, 423 N.Y.S.2d 580, 594 (Sup. Ct. 1979), *aff'd as modified sub nom. Eichner v. Dillon*, 73 A.D.2d 431, 426 N.Y.S. 2d 517 (App. Div. 1980), *aff'd as modified sub nom. In re Storar*, 52 N.Y.S.2d 363, 420 N.E.2d 64, 438 N.Y.S.2d 266, *cert. denied*, 454 U.S. 858 (1981)
Leach v. Akron Gen. Med. Ctr., 68 Ohio Misc. 1, 10, 426 N.E.2d 809, 815 (Ct. C.P. 1980)
In re Fiori, 438 Pa. Super. 610, 619, 652 A.2d 1350, 1354 (1995) (en banc), *aff'd*, 673 A.2d 905 (Pa. 1996)

APPENDIX B

The state living will statutes that distinguish between forgoing life support and assisted suicide include the following:

Ala. Code § 22-8A-10 (1995)
Alaska Stat. § 18.12.080(f) (1995)
Ariz. Rev. Stat. Ann. § 36-3210 (1995)
Ark. Code Ann. § 20-17-210(g) (Michie 1995)
Cal. Health & Safety Code § 7191.5(g) (West 1995)
Colo. Rev. Stat. Ann. § 15-18-112(1) (West 1995)
Conn. Gen. Stat. Ann. § 19a-575 (West 1995)
Del. Code Ann. tit. 16, § 2507 (1995)
D.C. Code Ann. § 6-2430 (1995)
D.C. Code Ann. § 21-2212 (1995) (durable power of attorney for health care)
Fla. Stat. Ann. § 765.309(1) (West 1995)
Ga. Code Ann. § 31-32-9 (1995)
Ga. Code Ann. § 31-36-2 (1995) (durable power of attorney for health care)
Haw. Rev. Stat. § 327D-13 (1995)
Idaho Code § 39-161(1) (1995) (do not resuscitate orders)
Ill. Comp. Stat. ch. 755, para. 35/9(f) (Smith-Hurd 1995)
Ill. Comp. Stat. ch. 755, para. 40/50 (Smith-Hurd 1995) (durable power of attorney for health care)
Ind. Code Ann. § 16-36-1-13 (West 1995) (durable power of attorney for health care)
Ind. Code Ann. § 16-36-4-19 (West 1995)
Iowa Code Ann. § 144A.11.6 (West 1995)
Iowa Code Ann. § 144B.12.2 (West 1995) (durable power of attorney for health care)
Kan. Stat. Ann. § 65-28,109 (1995)
Ky. Rev. Stat. Ann. § 311.637 (Baldwin 1995)
La. Rev. Stat. Ann. § 1299.58.10 (West 1995)
Me. Rev. Stat. Ann. tit. 18-A, § 5-813 (West 1995)
Md. Code Ann., Health-Gen. § 5-611 (1995)
Mass. Gen. Laws Ann. ch. 201D, § 12 (West 1995) (durable power of attorney for health care)

Mich. Comp. Laws Ann. § 700.496(20) (West 1995) (durable power of attorney for health care)
Minn. Stat. Ann. § 145B.14 (West 1995)
Miss. Code Ann. § 41-41-117(2) (1993)
Mo. Ann. Stat. § 459.055(5) (Vernon 1995)
Mont. Code Ann. § 50-9-205(7) (1995)
Neb. Rev. Stat. § 20-412(7) (1995)
Nev. Rev. Stat. § 449.670(2) (1993)
N.H. Rev. Stat. Ann. § 137-H:10(II) (1995)
N.J. Stat. Ann. § 26:2H-54(e) (West 1995)
N.M. Stat. Ann. § 24-7-8 (Michie 1996)
N.Y. Pub. Health Law § 2989(3) (McKinney 1995) (durable power of attorney for health care)
N.C. Gen. Stat. § 90-320(b) (1995)
N.D. Cent. Code § 23-06.4-01 (1995)
N.D. Cent. Code § 23-06.5-01 (1995) (durable power of attorney for health care)
Ohio Rev. Code Ann. § 2133.12(d) (Baldwin 1996)
Okla. Stat. Ann. tit. 63, § 3101.12(g) (West 1995)
Or. Rev. Stat. § 127.570 (1995)
20 Pa. Cons. Stat. Ann. § 5402(b) (1995)
R.I. Gen. Laws § 23-4.10-9(f) (1995) (durable power of attorney for health care)
R.I. Gen. Laws § 23-4.11-10(f) (1995)
S.C. Code Ann. § 44-77-130 (Law. Co-op. 1993)
S.D. Codified Laws Ann. § 34-12D-20 (1996)
Tenn. Code Ann. § 32-11-110 (1995)
Tex. Health & Safety Code Ann. § 672.020 (West 1995)
Utah Code Ann. § 75-2-1118 (1995)
Vt. Stat. Ann. tit. 18, § 5260 (1995)
Va. Code Ann. § 54.1-2990 (Michie 1995)
Wash. Rev. Code Ann. § 70.122.100 (West 1995)
W. Va. Code § 16-30-10 (1995)
Wis. Stat. Ann. § 154.11(6) (West 1995)
Wyo. Stat. § 3-5-211 (1995) (durable power of attorney for health care)
Wyo. Stat. § 35-22-109 (1995)

APPENDIX C

This appendix lists the forty-five states that criminalize assisted suicide, either by statute or judicial decision.

The following thirty-seven states and territories have statutes that explicitly impose criminal penalties for assisting a suicide:

Alaska Stat. § 11.41.120(a)(2) (1995)
Ariz. Rev. Stat. Ann. § 13-1103(A)(3) (1995)
Ark. Code Ann. § 5-10-104(a)(2) (Michie 1995)
Cal. Penal Code § 401 (West 1995)
Colo. Rev. Stat. § 18-3-104(1)(b) (West 1995)
Conn. Gen. Stat. Ann. § 53a-56(a)(2) (West 1995)
Del. Code Ann. tit. 11, § 645 (1995)
Fla. Stat. Ann. § 782.08 (West 1995)
Ga. Code Ann. § 16-5-5(b) (1995)
Haw. Rev. Stat. § 707-702 (1995)
Ill. Comp. Stat. ch. 720, para. 5/12-31 (Smith-Hurd 1995)
Ind. Code Ann. § 35-42-1-2.5(b) (West 1995)
Iowa Code Ann. §§ 707A.2, 707A.3 (West 1996)
Kan. Stat. Ann. § 21-3406 (1995)
Ky. Rev. Stat. Ann. § 216.302 (Baldwin 1995)
La. Rev. Stat. Ann. § 14:32.12 (West 1995)
Me. Rev. Stat. Ann. tit. 17-A, § 204 (West 1995)
Minn. Stat. Ann. § 609.215 (West 1995)
Miss. Code Ann. § 97-3-49 (1993)
Mo. Ann. Stat. § 565.023(1)(2) (Vernon 1995)
Mont. Code Ann. § 45-5-105 (1993)
Neb. Rev. Stat. § 28-307 (1995)
N.H. Rev. Stat. Ann. § 630:4 (1995)
N.J. Stat. Ann. § 2C:11-6 (West 1995)
N.M. Stat. Ann. § 30-2-4 (Michie 1995)
N.Y. Penal Law § 120.30 (McKinney 1995)
N.Y. Penal Law § 125.15 (McKinney 1995)
N.D. Cent. Code § 12.1-16-04 (1995)
Okla. Stat. Ann. tit. 21, § 813 (West 1995)
Or. Rev. Stat. § 163.125(b) (1995)
18 Pa. Cons. Stat. Ann. § 2505 (1995)

P.R. Laws Ann. tit. 33, § 4009 (1990)
S.D. Codified Laws Ann. § 22-16-37 (1996)
Tenn. Code Ann. § 39-13-216 (1995)
Tex. Penal Code Ann. § 22.08 (West 1995)
V.I. Code Ann. tit. 14, § 2141 (1994)
Wash. Rev. Code Ann. § 9A.36.060 (West 1995)
Wis. Stat. Ann. § 940.12 (West 1995)

The following two states have negligent homicide statutes broad enough to penalize assisting a suicide: Ala. Code § 13A-6-4 (1995); and Wyo. Stat. § 6-2-107 (1995).

The following six states have case law authorizing the imposition of criminal penalties for assisting a suicide: *McMahan v. State*, 168 Ala. 70, 73, 53 So. 89, 91 (1910); *Commonwealth v. Mink*, 123 Mass. 422, 428-29 (1877); *Commonwealth v. Bowen*, 13 Mass. 356, 358 (1816); *People v. Kevorkian*, 447 Mich. 436, 493-97, 527 N.W. 2d 714, 738-39 (1994), *cert. denied*, 115 S. Ct. 1795 (1995); *State v. Willis*, 255 N.C. 473, 477, 121 S.E.2d 854, 856-57 (1961); *Blackburn v. State*, 23 Ohio St. 146, 163 (1872); and *State v. Jones*, 86 S.C. 17, 22, 47, 67 S.E. 160, 162, 165 (1910).